APPENDIX E

NOTE: Pursuant to Fed. Cir. R. 47.6, this order is not citable as precedent. It is a public record.

United States Court of Appeals for the Federal Circuit

MISCELLANEOUS DOCKET NO. 389

JAMES B. KING, Director,
Office of Personnel Management,

Petitioner,

V.

RICHARD L. FRAZIER,

Respondent.

ON OPM PETITION FOR REVIEW

Before ARCHER, Circuit Judge, COWEN, Senior Circuit Judge, and RADER, Circuit Judge.

RADER, Circuit Judge.

ORDER

The Director of the Office of Personnel Management (OPM) petitions for review of the December 9, 1992 decision, (reconsideration denied on October 19, 1993) of an arbitrator reversing the Department of Housing and Urban Development's (HUD) 60-day suspension of Richard L. Frazier. Frazier opposes.

On February 17, 1991, HUD proposed to suspend Frazier for 60 days for engaging in sexual harassment and notoriously disgraceful conduct. Frazier denied engaging in any such behavior. On October 29, 1991 HUD suspended Frazier, finding that the charges were supported by a preponderance of the evidence and that the suspension would promote the efficiency of the service.

Frazier filed a grievance and the matter was pursued to arbitration. The parties agreed that the issues subject to arbitration were a timeliness matter that is not at issue here and whether the "suspension was for just cause." The arbitrator determined that Frazier was "not guilty of sexual harassment so that the 60-day suspension was not for just cause" and ordered HUD to expunge the disciplinary action from Frazier's personnel file and give him backpay. The arbitrator found that the statements made by Frazier were of a sexual nature and could be perceived by most as no less than notoriously disgraceful." However, the arbitrator concluded that "Mr. Frazier did not know right from wrong; that his conduct was contrary to public policy, let alone that his sexually explicit statements directly made to a number of

women exhibited notoriously disgraceful conduct or even that his several outbursts in the office, sexually describing women passing outside and his desires as they pertained to these women, were unprofessional and lacked good taste." Finally, the arbitrator stated that "there was no evidence presented that agency management had ever brought to Mr. Frazier's attention, by requiring his attendance at a meeting, the significance of sexual harassment under the law, and the penalties that would be invoked for conduct by any agency personnel."

OPM requested reconsideration of the arbitrator's decision. As gleaned from the arbitrator's reconsideration decision, OPM argued that the arbitrator (1) erred in departing from the "efficiency of the service standard" and substituting a standard applicable to criminal proceedings, (2) erred in requiring HUD to prove wrongful intent, (3) erred in requiring the agency to prove it informed Frazier about conduct that constitutes sexual harassment, and (4) failed to look at the record as a whole. With regard to the arguments concerning the efficiency of the service and the need to prove intent, the arbitrator stated that HUD did not refer to the concept of efficiency of the service or even refer to the words. With regard to OPM's argument that the agency did not have to disseminate information about conduct, the arbitrator discussed the argument but failed to address the merits. Finally, the arbitrator conceded that he stated the law concerning totality of the circumstances incorrectly, but that he had nonetheless applied it correctly.

OPM now petitions this court for review arguing that the arbitrator erred in interpreting the law and that the decision will have a substantial impact on the administration of the civil service. 5 U.S.C. 7703 (d). This court must determine for itself whether an exercise of our discretionary jurisdiction is warranted because the decision will have a substantial impact on civil service law. Devine v. Sutermeister, 724 F.2d 1558, 1562 (Fed. Cir. 1983). OPM argues that the decision conflicts with the Civil Service Reform Act and "departs dramatically from long-standing precedent concerning the Government's burden of proof in personnel cases." OPM asserts that the arbitrator has infused an additional legal element into adverse personnel actions, not one required by the Reform Act.

Although we may agree that the arbitrator erred in his decision, we are persuaded that the decision will have the requisite substantial impact. Importantly, it appears that HUD, at least tacitly, agreed to the standards and burdens of proof that were presented in the arbitration proceeding. Thus, the circumstances are distinct from a case where the agency argued before the arbitrator or the Board that proper procedures, burdens, and precedents were not being followed. In that case, substantial impact argument would have more force. Here, the decision of the arbitrator stemmed from the parties' formulation of the issues and presentation of their cases. OPM cannot now argue that the decision will have a substantial impact when the agency agreed to the terms of the hearing.

Accordingly,

IT IS ORDERED THAT:

OPM'S PETITION FOR PERMISSION TO APPEAL IS DENIED.

FOR THE COURT

Feb 24, 1994
Date

s/Randall R. Rader
Randall R. Rader
Circuit Judge

cc: Ross D. Cooper, Esq.
Otto P. Witt, Esq.

A True Copy

Attest: 2/24/94

s/James Benjamin
Deputy Clerk

APPENDEX F

APPENDIX F

7703. Judicial review of decisions of the Merit Systems Protection Board

(d) The director of the Office of Personnel Management may obtain review of any final order or decision of the Board by filing a petition for judicial review in the United States Court of Appeals for the District of Columbia if the Director determines, in his discretion, that the Board erred in interpreting a civil service law, rule, or regulation affecting personnel management and that the Board's decision will have a substantial impact on a civil service law, rule, regulation, or policy directive. If the Director did not intervene in a matter before the Board, the Director may not petition for review of a Board decision under this section unless the Director first petitions the Board for a reconsideration of its decision, and such petition is denied. In addition to the named respondent, the Board and all other parties to the proceedings before the Board shall have the right to appear in the proceeding before the Court of Appeals. The granting of the petition for judicial review shall be at the discretion of the Court of Appeals.